

¹ The Review & Modification of an Award lists “the transcript of the Review and Modification hearing, dated December 6, 2010” as part of the record. It appears the transcript itself is incorrectly titled “Regular Hearing.” Citations to that December 6, 2010, hearing transcript will be delineated as R.M.H. Trans.

ISSUES

In the May 13, 2011, Review & Modification of an Award, ALJ Klein determined that claimant suffered an additional impairment and ordered claimant's original award modified to a 43% impairment to the right lower extremity.

In its brief to the Board respondent states:

Respondent respectfully submits that Ms. Cantrell is not entitled to review and modification of her previous agreed award, because of the plain language contained in K.S.A. §§ 44-510d(b) & 44-528(a). Furthermore, she is not entitled to any additional weeks of PPD benefits, because she failed to present evidence that her statutorily presumed permanent partial disability ever ceased to exist. Therefore, once 200 weeks passed following her workplace injury, she was not entitled to any additional PPD benefits. Accordingly, as she did not pursue review and modification before the 200 weeks expired, she is not entitled to any additional PPD benefits.²

Claimant submits: "A consistent and sensible interpretation of the scheduled injury statute and the review and modification statute would allow review and modification of a scheduled injury beyond 200 weeks from the date of the injury and would limit the amount of compensation to 200 weeks pursuant to the statute."³

The issues before the Board on this appeal are:

1. Does K.S.A. 44-510d(b) preclude any additional award of temporary total or permanent partial disability benefits following an award for a scheduled injury? Respondent asserts that once an award is made for a scheduled injury, the plain language of K.S.A. 44-510d(b) does not allow for any additional compensation.

2. Claimant suffered a leg injury. K.S.A. 44-510d(a) limits claimant's benefits for loss of a leg to 200 weeks. Respondent argues that once more than 200 weeks has passed since the original injury, claimant is not entitled to additional weeks of permanent partial disability benefits. Is claimant entitled to additional weeks of permanent partial disability benefits?

² Respondent's Brief at 7 (filed July 6, 2011).

³ Claimant's Brief at 5 (filed August 5, 2011).

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Claimant suffered a work-related injury to her right knee on July 6, 2005. Pursuant to an August 10, 2006, Agreed Award, claimant received workers compensation benefits based on a 20% permanent functional impairment to the right lower extremity. In the Agreed Award the parties stipulated to an accident date of July 6, 2005, and each and every working day thereafter. Claimant continued to have right knee problems and in March 2010, she underwent a right total knee replacement by Dr. Pappademos. Respondent authorized the knee replacement.

Following the surgery by Dr. Pappademos, claimant was examined by Drs. Pedro A. Murati and Kenneth A. Jansson. Dr. Murati, a certified independent medical examiner, opined claimant has a 50% permanent impairment to the right lower extremity. Dr. Jansson, an orthopedic surgeon, opined claimant has a 5% permanent impairment to the right lower extremity. Based upon the opinions of Drs. Murati and Jansson, the parties on November 8, 2010, filed a written stipulation that claimant's current impairment is 43% to the right lower extremity.⁴

On July 27, 2010, claimant filed an application for review and modification. At the review and modification hearing claimant testified briefly. Counsel set forth the dispute between the parties when they stated at the hearing:

The Court: All right. What's the issue under the review and mod?

Mr. Lee: Judge, the issue is whether she is entitled to additional compensation pursuant to 44-510(e) *[sic]* I believe, the scheduled injury statute, and also attorney's fees if she is not, Judge, and I would offer just for ease of reference a copy of the agreed award of August 10th, 2006, which I would request be attached to the transcript, and a copy of our stipulation which was entered into on November 8th, 2010 and filed with the Court on that date, as Exhibits 1 and 2.

Mr. Donley: I have no objection, Your Honor.

The Court: All right. Mr. Donley?

Mr. Donley: No, that is exactly correct on the issue, the real issue is since it has been so long since the date of accident, is she entitled to review and modification of a scheduled injury, even though we've stipulated to an increase in impairment. As you would expect, my position is that, you know, the weeks under the schedule have expired, and so she is not entitled to any additional compensation. And that's

⁴ R.M.H. Trans., Cl. Ex. 2.

exactly what we're litigating, so I'm not sure if there is even any other evidence that needs to be taken after today. I'm willing to submit within 30 days if counsel is.⁵

PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.⁶

K.S.A. 44-510d(a) in part states:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

⁵ *Id.*, at 5-6.

⁶ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-510d(b) states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-528(a) states:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

In *Bergstrom*,⁷ the Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The Kansas Supreme Court stated at Syl. ¶ 6 in *Casco*:⁸

⁷ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

⁸ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.

Claimant in her brief and the ALJ in his Review & Modification of an Award cite *Meyer*.⁹ That claim involved a series of accidents with an ending date of April 13, 2004. Meyer's injuries were to his shoulders and, therefore, his permanent partial disability benefits were calculated under K.S.A. 44-510d(a)(13) at the 225-week level. The 225-week period after the accident date expired August 5, 2008. Meyer filed his application for review and modification on March 10, 2009. Bombardier/Learjet (Bombardier) argued that even employing the six-month look back period provided for in K.S.A. 44-528(d), the earliest possible date for Meyer to receive additional compensation under an award for review and modification was September 10, 2008. As September 10, 2008, was beyond 225 weeks from the date of accident, Bombardier contended that Meyer's application for review and modification was untimely.

This Board rejected Bombardier's argument that Meyer's application for review and modification was barred. The Board distinguished the language of K.S.A. 44-510d from that of K.S.A. 44-510e, stating:

But K.S.A. 44-510e(a)(3) contains language that is different from the scheduled injury statute, K.S.A. 44-510d.

In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto. [Footnote citing K.S.A. 44-510e(a)(3).]

K.S.A. 44-510d contains no such time limitation. Instead, permanent partial disability compensation is limited only by number of weeks:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .
(13) . . . for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structure, 225 weeks. [Footnote citing K.S.A. 44-510d(a).]

⁹ *Meyer v. Bombardier/Learjet*, No. 1,015,257, 2010 WL 3093217 (Kan. WCAB July 14, 2010).

Because of the different statutory language, the Board holds that unlike compensation for general body disabilities under K.S.A. 44-510e, where review and modification is limited to a 415-week time period, review and modification of scheduled injuries is limited by the number of weeks of disability payments, not calendar weeks from the date of accident.¹⁰

ANALYSIS AND CONCLUSION

The facts in this case are not in dispute. Claimant suffered a work-related injury to her right knee on July 6, 2005. Pursuant to an August 10, 2006, Agreed Award, claimant received workers compensation benefits based on a 20% permanent functional impairment to the right lower extremity. Claimant continued to have right knee problems and in March 2010, she underwent a right total knee replacement. The parties stipulated that claimant's current impairment as a result of her work-related injury is 43% to the right lower extremity.

Claimant has received all benefits due her pursuant to the Agreed Award. On July 27, 2010, the date claimant filed her application for review and modification, more than 200 weeks had passed since claimant's accident. In fact, more than 200 weeks transpired between the date of the Agreed Award and the date claimant filed her application for review and modification.

Respondent's first argument is that the plain language of K.S.A. 44-510d(b) does not allow a claimant to be awarded additional compensation once a scheduled injury award is entered. Respondent asserts that K.S.A. 44-510d is a more specific statute than K.S.A. 44-528. Therefore, the language of K.S.A. 44-510d controls.

K.S.A. 44-528 allows an ALJ to modify an existing award where "... the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished"¹¹ Respondent argues that K.S.A. 44-510d(b) does not allow a claimant to be paid additional benefits after an award is made for a scheduled injury. In essence, respondent asserts the specific language of K.S.A. 44-510d(b) is an exception to the general language of K.S.A. 44-528. The Board disagrees with this analysis.

Pursuant to K.S.A. 44-510d(a)(16) claimant is entitled to a maximum of 200 weeks of benefits. The Agreed Award granted claimant a total of 44 weeks of benefits (5 weeks of temporary total disability benefits and 39 weeks of permanent partial disability benefits). Claimant is not seeking more than 200 weeks of benefits. She is merely requesting additional benefits to which she is legally entitled under K.S.A. 44-510d. No language

¹⁰ *Id.*

¹¹ K.S.A. 44-528.

contained in K.S.A. 44-510d expressly precludes a scheduled injury award from being modified. The language of K.S.A. 44-510d(b) prohibits a worker from seeking benefits for a scheduled injury that exceed those permitted by the Kansas Workers Compensation Act; it does not prohibit review and modification of a scheduled injury award.

The Board is cognizant of the fact that *Bergstrom* and *Casco* require a strict construction of the Kansas Workers Compensation Act. When a workers compensation statute is plain and unambiguous, courts must give effect to its express language. The express language of K.S.A. 44-528(a) allows an ALJ to modify an award where a claimant's functional impairment has increased.

The plain, express language of K.S.A. 44-510d(a)(16) allows a claimant with a scheduled leg injury to receive up to 200 weeks of benefits. K.S.A. 44-510d(b) provides that the benefits to which a claimant is entitled are limited to the schedule in K.S.A. 44-510d(a). There is no express language in K.S.A. 44-510d(b) that states an award for a scheduled injury may not be modified.

Adopting the foregoing argument of respondent would severely and unduly restrict a claimant's right to review and modify a scheduled injury award. It would establish a statute of limitations that would be different for claimants who injured the same body part. For example, a claimant with a 5% permanent impairment of the leg would be limited to filing an application for review and modification within 10 weeks of the date of accident while a claimant with a 50% permanent impairment would have 100 weeks. If respondent's argument were adopted, many claimants' right to review and modify a scheduled injury claim would cease on the date the award was issued.

Respondent's second argument is that once 200 weeks from the date of accident has expired, claimant may no longer file an application for review and modification. It alleges that claimant's right to compensation benefits accrued from the date of accident. Accordingly, claimant's permanent partial disability benefits began running on July 7, 2005. Once 200 weeks from the date of accident have passed, claimant is not entitled to any additional weeks of permanent partial disability benefits. Respondent asserts that the plain language of K.S.A. 44-510d supports this argument.

Claimant contends the Board is bound by its ruling in *Meyer*. Respondent asks the Board to ignore *Meyer* and look to the plain language of K.S.A. 44-510d. In *Meyer*, the Board did examine the plain language of K.S.A. 44-510d and found it contains no time limitations for filing an application for review and modification. The Board held the "... review and modification of scheduled injuries is limited by the number of weeks of disability payments, not calendar weeks from the date of accident."¹²

¹² *Meyer v. Bombardier/Learjet*, No. 1,015,257, 2010 WL 3093217 (Kan. WCAB July 14, 2010).

The Board finds its ruling in *Meyer* is applicable to the current claim. If this had been a non-scheduled injury pursuant to K.S.A. 44-510e and more than 415 weeks had passed since claimant's date of accident, claimant's application for review and modification would have been barred. K.S.A. 44-510d contains no such time limitations. The Board concludes that claimant's application for review and modification was timely filed and is permitted by the plain, express language of K.S.A. 44-510d.

The Board affirms the ALJ's finding modifying the Agreed Award. Claimant has an increase in permanent functional impairment to her right lower extremity from 20% to 43%.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the May 13, 2011, Review & Modification of an Award entered by ALJ Klein as follows:

Rosella L. Cantrell is granted modification of her award for the increased functional impairment to her right leg. Ms. Cantrell is entitled to receive 5 weeks of temporary total disability benefits at \$214.55 per week, or \$1,072.75, followed by 83.85 weeks of permanent partial disability benefits at \$214.55 per week, or \$17,990.02, for a 43% permanent partial disability to her right knee at the level of the leg, making a total award of \$19,062.77, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the May 13, 2011, Review & Modification of an Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

¹³ K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of October, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge